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Overview of a City's Tort Liability Duties to Maintain and Protect Local Government Services from Sea Level Rise: Poquoson Case Study

Alex Horning

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Overview of a City's Tort Liability Duties to Maintain and Protect Local Government Services from Sea Level Rise

Poquoson Case Study

Alex Horning
Law School Graduate
Virginia Coastal Policy Clinic
at William & Mary Law School

VIMS | William & Mary
Virginia Institute of Marine Science

William & Mary Law School

Sea Grant Virginia

SPRING 2013

Contact Us

Please contact Shana Jones at scjones@wm.edu if you have comments, questions, or suggestions.

About the Author

Alex Horning graduated from William & Mary Law School in 2013. At William & Mary, Mr. Horning served on the William & Mary Law Review, and interned at Virginia Sea Grant, Pennsylvania Department of Environmental Protection, and Beveridge & Diamond, P.C., where he will continue working after the bar exam. He graduated from Gettysburg College in 2010 with a Bachelor of Sciences degree in Environmental Studies and Political Science.

About the Virginia Coastal Policy Clinic

The Virginia Coastal Policy Clinic (VCPC) at William & Mary Law School provides science-based legal and policy analysis of environmental and land use issues affecting the state's coastal resources and educates the Virginia policy making, non-profit, legal and business communities about these subjects.

Working in partnership with Virginia scientists, law students in the clinic integrate the latest science with legal and policy analysis to solve coastal resource management issues. Examining issues ranging from property rights to federalism, the clinic's activities are inherently interdisciplinary, drawing on scientific, economic, and policy expertise from across the university. VCPC has a strong partnership with the Virginia Institute of Marine Science (VIMS) and Virginia Sea Grant.

VCPC is especially grateful to the Virginia Environmental Endowment for providing generous funding to establish the clinic in fall 2012.

A Note from the[1] VCPC Director

VCPC received funding from the Virginia Environmental Endowment to produce a series of white papers analyzing legal issues Virginia localities may face as they respond and adapt to increased flooding caused by sea level rise. To focus the students' analysis, we selected two Virginia jurisdictions—Norfolk and Poquoson—to analyze. The students utilized facts from published reports and press accounts to inform their work. Although we focused on these two jurisdictions, the issues raised are broadly applicable to similarly situated cities in Virginia. The reader should be aware, however, that the legal issues that county governments may face might be different from those in the city government context.

Future work is likely to involve interviews, additional analysis, and engagement with the broader policy community about some of the issues raised. Adapting to flooding and sea level rise is a complex area. We have not identified all of the possible legal issues that may arise. Nor have we necessarily answered every possible legal question as part of the analysis that was conducted. We hope, however, that our white papers begin to answer some of the threshold questions facing Virginia localities at this time. We also anticipate that they lay the groundwork for in-depth work and identify areas of needed discussion and additional research. We therefore welcome any feedback on our work.

Finally, a special thanks goes to Chris Olcott, a rising third-year law student and Virginia Sea Grant Summer Fellow, for source-checking and editing this white paper. VCPC is also grateful to Virginia Sea Grant for funding the VCPC Summer Fellow program at William & Mary Law School.

Introduction

Poquoson's local government services are increasingly vulnerable to sea level rise. Ninety percent of Poquoson is in the 100 year floodplain,[1] including forty-eight miles of Poquoson's roads, the police station, fire station, and five schools.[2] Poquoson's Multi-Hazard Mitigation plan cautions that Poquoson's sewers are subject to flooding and could be vulnerable to future sea level rise.[3] With these public assets at risk and limited relocation possibilities,[4] Poquoson may decide to stop maintaining public services to avoid expensive maintenance necessitated by sea level rise.

If Poquoson stops maintaining existing road, drainage, erosion, and flood control works, water services, sewer services, or emergency services, Poquoson could face lawsuits claiming that Poquoson has a duty to maintain these services. Although the outcome of a lawsuit will depend on the individual case, Poquoson may be liable for the failure to maintain roads and sewer services. Poquoson could avoid liability for the failure to maintain roads by following the procedures to discontinue roads outlined in Virginia Code § 15.2-2006. A court is unlikely to hold Poquoson liable for lawsuits alleging failure to maintain drainage, erosion, and flood control works, water services, or emergency services. A court is also unlikely to hold Poquoson liable for discretionary decisions about roads, sewer services, and emergency services.

Poquoson's Risk of Negligence Liability

Poquoson may be liable for:

- Failure to maintain roads.
- Failure to maintain sewer services.
- Failure to maintain water services, if it provides these services in the future instead of contracting for them.

Poquoson is unlikely to be liable for:

- Failure to maintain discontinued roads.
- Failure to maintain drainage, erosion, and flood control works.
- Failure to maintain water services, although it may be liable if it provides these services itself instead of contracting for them.
- Failure to maintain emergency services.
- Discretionary decisions about roads, water, sewer, and emergency services.

Analysis

Poquoson's actions and inactions pertaining sea level rise could be challenged by injured businesses and property owners using a negligence theory of tort liability. A successful negligence claim must prove four elements:

1. The city had a duty;
2. The city breached that duty;

3. The city's breach caused harm; and

4. Damages resulted from the harm.[5]

Poquoson can defend negligence claims by refuting any of these elements or by asserting sovereign immunity. The following sections analyze potential negligence claims alleging the failure to maintain existing roads, drainage, erosion, and flood control works, water services, sewer services, and emergency services. Challenges using a nuisance theory of tort liability are not addressed in this paper.

Poquoson's Duty to Maintain Existing Services

Poquoson may have a duty to:	Poquoson may not have a duty to:
· Maintain roads.	· Maintain discontinued roads.
· Maintain sewer services.	· Maintain water services, although its contractor, Newport News Waterworks, may have a duty to maintain.
· Maintain emergency services.	· Maintain drainage, erosion, and flood control works.
· Maintain water services, if it provides these services in the future instead of contracting for them.	

Poquoson's Duty to Maintain Services Depends on the Service Involved

Poquoson may have a duty to maintain existing services depending on the service involved. Poquoson has a duty to maintain roads unless it follows the procedures to discontinue roads. Poquoson may also have a duty to maintain sewer services. Poquoson may not have a duty to maintain drainage, erosion, and flood control works, water services, or emergency services.

Poquoson Must Maintain Roads Unless it Follows Procedures to Discontinue Them

Poquoson has a duty to maintain roads in a safe condition[6] but can vacate this duty through statutory procedures.[7] Cities must keep their roads safe for travel and repair roads if the city has notice of unsafe conditions.[8] The duty to maintain roads extends to dangerous conditions adjacent to a road that could affect road travel.[9] Sea level rise can affect roads by causing more frequent flooding, road base failure, and pavement damage.[10] Poquoson has many low lying roads and must repair roads damaged from sea level rise if Poquoson knows about the unsafe conditions.

Poquoson does not have to ensure road safety during and immediately after snow or hurricane emergencies if Poquoson prioritizes its emergency responses to further citizens' welfare.[11] Flooding events made worse by sea level rise are weather emergencies similar to snowstorms and hurricanes. Poquoson likely does not have a duty to maintain road safety during and immediately after flooding if Poquoson is diverting emergency response resources to saving lives, restoring public utilities, monitoring storm damage, or other emergency responses furthering citizens' welfare.

Poquoson can discontinue its duty to maintain roads under Virginia Code § 15.2-2006. Discontinued roads remain available for public use but are not publicly maintained.[12] The procedures to discontinue roads are:

1. The person that wants to discontinue a road must advertise a hearing about the discontinuance in a local newspaper two times at least six days apart.[13]

2. The city council must hold the public hearing.[14]

3. The city council may create a small committee to review and report on any inconvenience that will result from the discontinuance.[15]

4. Finally, after notifying affected landowners, the city council can decide to discontinue the road.[16] If the city council discontinues a road, they must pass an ordinance recording the discontinuance.[17]

Virginia cities successfully defended discontinuing roads in at least two cases.[18] Virginia courts grant ordinances discontinuing roads deference.[19] In *Erichsen v. City of Norfolk*, a court upheld Norfolk's action discontinuing an unimproved road because citizens could still access their homes as pedestrians and the discontinuance promoted the public interest.[20] While Erichsen concerned only an unimproved road, *City of Lynchburg v. Peters* discontinued portions of two active roads. [21] These examples show that Poquoson can discontinue roads with repetitive flood damage because saving road maintenance costs serves the public interest and residents can still use the road for access. While discontinuing a road will not incur tort liability, takings liability should be analyzed, especially if residents cannot continue using the road for access.[22]

4

Poquoson Does Not have a Duty to Maintain Erosion, Drainage, and Flood Works

Poquoson does not have a duty to build or maintain drainage, erosion, or flood control works. Virginia Code § 15.2-970 states that cities "may construct a dam, levee, seawall, or other structure or device . . . to prevent the tidal erosion, flooding or inundation [of the city]," and thus does not require Poquoson to build these works.[23] If Poquoson chooses to build drainage, erosion, or flood control works, Virginia Code § 15.2-970 immunizes cities from negligent design, construction, performance, maintenance, and operation of these works.[24] Several Virginia courts extend this immunity to cover storm water drainage systems.[25] Although older Virginia Supreme Court cases require localities to maintain drainage works,[26] Virginia Code § 15.2-970 explicitly immunizes cities that do not maintain drainage, erosion, or flood control works. Thus, Poquoson does not have a duty in tort to maintain existing drainage, erosion, or flood control works.

Poquoson may still want to maintain existing erosion, flood, or drainage to avoid takings liability. This paper does not analyze takings liability. However, Virginia Code § 15.2-970 does not bar takings claims[27] and *Livingston v. Virginia Department of Transportation* indicates that the Virginia Supreme Court may hold the government liable for its failure to have adequate drainage and flood protection in certain circumstances. Please see VCPC's separate white paper on the *Livingston* case for further analysis.[28]

Poquoson Does Not have a Duty to Maintain Water Services

Poquoson does not currently provide water itself and thus does not have a duty to maintain existing water services. Virginia courts require cities to maintain the water services they provide.[29] This rule requiring cities to maintain water services does not apply to Poquoson because Poquoson contracts with Newport News Waterworks to provide and maintain water services.[30] Localities are not generally liable for the negligence of parties with whom they contract.[31] Thus, Poquoson does not have a duty to maintain water services because it contracts with Newport News Waterworks to provide and maintain water services. If sea level rise causes saltwater intrusion that corrodes water pipes, Newport News Waterworks has a duty to repair the pipes.

Even though Poquoson does not provide water services itself, property owners damaged from leaking water pipes might try to sue both Newport News Waterworks and Poquoson. Further research about the relationship between Poquoson and Newport News Waterworks is necessary to confirm that Newport News Waterworks has the sole duty to maintain Poquoson's water services. Further research is also necessary to determine whether Poquoson must provide water services itself if Newport News Waterworks stops providing water services because of costs associated with sea level rise.

Poquoson Must Maintain Sewer Services

Poquoson has a duty to maintain sewer services. Virginia courts require cities to maintain their sewer systems.[32] Poquoson has a public sewer system and generally requires structures within 1000 feet of the system to connect.[33] Sewer systems are vulnerable to sea level rise because saltwater intrusion can cause backflow and corrode pipes.[34] If saltwater intrusion causes backflow or corrodes pipes, Poquoson must repair its sewer systems.

While Poquoson must maintain its sewer services, Poquoson can try to limit maintenance costs by contracting with another entity to provide sewer services.[35] Additionally, Poquoson can pay for increasing sewer maintenance costs by reasonably raising sewer fees.[36]

Poquoson Must Maintain Emergency Services

Poquoson has a duty to maintain emergency services. Virginia Code § 15.2-955 requires localities to "seek to ensure that emergency medical services are maintained throughout the entire locality."[37] Poquoson does not need to provide emergency services itself. Poquoson can contract with other entities to provide emergency services within Poquoson.[38]

Poquoson could construe Virginia law to allow prioritization of emergency services during an emergency like a hurricane or nor'easter. Virginia statutes allow localities to regulate emergency services.[39] Virginia statutes require cities to adopt emergency operations plans and allow cities to restrict services during an emergency.[40] If Poquoson prioritized emergency response services through legislation or its emergency services plan, it may be able to prioritize services in certain locations to ensure the safety of residents and emergency responders. The Poquoson Emergency Operations Plan acknowledges that transportation may be difficult during emergencies and allows the Emergency Operations Center to coordinate requests for transportation support.[41] Poquoson's Emergency Operation Plan also recognizes the need to protect emergency re-

sponders.[42] Poquoson's authority to regulate emergency services and adopt emergency operations plans may allow it to prioritize locations for emergency response during a hurricane or nor'easter to serve residents and protect emergency responders. If homes along the coast are inaccessible to emergency responders and other accessible residents are at risk, or if rescuing residents poses a threat to emergency responders, Poquoson could prioritize rescue efforts.

Breach, Causation, and Harm

After establishing that Poquoson owes the plaintiff a duty, the plaintiff must also establish that Poquoson breached the duty, the breach caused the plaintiff harm, and damages.[43] A court determines whether a defendant breached a duty to a plaintiff by asking whether the defendant acted reasonably under the circumstances.[44] A court determines whether a breach causes harm by asking whether an act or failure to act leads to an event that would not otherwise occur.[45] Plaintiffs must also prove damages to receive an award. Whether Poquoson acted unreasonably, caused harm, and caused damages will depend on the individual facts of a negligence claim.

Defenses

Sovereign Immunity

If a plaintiff successfully establishes negligence, Poquoson can defeat some negligence claims relating to sea level rise using sovereign immunity. Successful sovereign immunity claims shield the government from liability.[46] Poquoson can likely claim sovereign immunity to avoid liability for injuries resulting from discretionary decisions about roads, drainage, erosion, and flood control works, water services, sewer services, and emergency services. Poquoson cannot claim sovereign immunity for injuries resulting from the failure to maintain roads and sewer services.

Generally, Poquoson can claim sovereign immunity for governmental functions but not for proprietary functions.[47] Governmental functions are either discretionary or performed for the public's benefit.[48] Proprietary functions are either ministerial or performed for the municipality's benefit.[49] When a municipality's function is both governmental and proprietary, the municipality's function is governmental.[50]

Poquoson's Sovereign Immunity

Poquoson can claim sovereign immunity for:

- Discretionary decisions about roads, water, sewer, and emergency services.
- Failure to maintain drainage, erosion, and flood control works.
- Failure to maintain water services if Poquoson provides the water services, not Newport News Waterworks.

Poquoson cannot claim sovereign immunity for:

- Failure to maintain roads.
- Failure to maintain sewer services.
- Failure to maintain emergency services.

Poquoson Cannot Claim Sovereign Immunity for the Failure to Maintain Roads

Poquoson cannot claim sovereign immunity for injuries arising from a failure to maintain roads but can claim sovereign immunity for injuries arising from road design flaws and emergency weather conditions.[51] Virginia courts do not grant sovereign immunity to cities that do not maintain roads in a safe condition. Poquoson cannot claim sovereign immunity if it does not maintain flood damaged roads. However, Poquoson cannot be sued for its failure to maintain discontinued roads.

Poquoson can claim sovereign immunity if an injury results from governmental discretionary decisions concerning road construction, design, or placement. In T*aylor v. City of Charlottesville*, Charlottesville could claim sovereign immunity because its decision to build a dead end street near a creek was a discretionary decision.[52] Similarly, Poquoson can claim sovereign immunity if a plaintiff claims Poquoson negligently built a road in a flood prone area because this is a governmental discretionary decision.

Poquoson can claim sovereign immunity if a plaintiff's injury arises from conditions during and immediately after a weather emergency. Virginia courts grant sovereign immunity to cities for injuries sustained during and immediately after hurricanes and snowstorms.[53] In *Gambrell v. City of Norfolk*, Norfolk was not liable when a plaintiff fell on ice in a parking lot because the city prioritized road plowing over parking lot maintenance.[54] Floods are uncontrollable weather events similar to hurricanes and snowstorms during which Poquoson must prioritize emergency response. Poquoson can claim sovereign immunity from tort claims arising from injuries on impaired roads during or immediately after hurricanes or floods because Virginia gives cities discretion to direct emergency response.

Poquoson Can Claim Sovereign Immunity for the Failure to Maintain Drainage, Erosion, and Flood Control Works

Poquoson can claim sovereign immunity for injuries arising from drainage, erosion, and flood control works. Virginia Code § 15.2-970 immunizes cities against claims arising from the "design, maintenance, performance, operation or existence" of drainage, erosion, or flood control works. Poquoson is immune from tort liability under this statute if any drainage, erosion, or flood control projects fail and cause damages. While Poquoson is immune from tort claims alleging failure to maintain drainage, erosion, and flood control works, Poquoson is not immune from takings claims alleging from Poquoson's failure to maintain these works.[55]

Poquoson Does Not Need Sovereign Immunity to Defend Allegations that Poquoson Failed to Maintain Water Services

Poquoson does not have a duty to maintain water services because Poquoson contracts with Newport News Waterworks to provide water and sewer systems. Poquoson's tort liability depends on its relationship with Newport News Waterworks, but generally localities are not liable for the negligent acts of parties with whom they contract.[56]

If Poquoson decides to provide water services itself, Poquoson cannot claim sovereign immunity for injuries caused by its failure to maintain water services.[57] Thus, Poquoson cannot claim sovereign immunity for its failure to maintain water services if periodic flooding gradually corrodes pipes because Poquoson has not maintained the pipes.

If Poquoson decides to provide water services itself, Poquoson can claim sovereign immunity for injuries caused by the planning, design, or redesign of water services.[58] Planning, design, and redesign decisions are discretionary decisions immune from tort liability claims.[59] For example, if storm surge causes well maintained pipes along the coast to leak, Poquoson will not be liable for its decision to place the pipes along the coast.

Poquoson Cannot Claim Sovereign Immunity for the Failure to Maintain Sewer Systems

Poquoson cannot claim sovereign immunity for injuries caused by the negligent maintenance of its sewer systems.[60] Thus, Poquoson cannot claim sovereign immunity for injuries resulting from its failure to repair aging pumping facilities or pipes gradually corroding from saltwater intrusion.

Poquoson can claim sovereign immunity for injuries caused by the "design and planning of sewer systems."[61] Design and planning decisions are discretionary and receive sovereign immunity. Poquoson will not be liable if storm surge causes a pumping station located near the coast to fail because the pumping station's location is a discretionary planning decision.

Poquoson Can Claim Sovereign Immunity for the Failure to Provide Emergency Services

Poquoson may claim sovereign immunity for injuries caused by its failure to provide emergency services. In *Edwards v. City of Portsmouth*, the Virginia Supreme Court extended sovereign immunity to Portsmouth when a plaintiff's husband did not receive emergency medical services.[62] The court granted sovereign immunity to Portsmouth because the city exercised its police powers to provide emergency medical services.[63] However, the court decided *Edwards* before Virginia law required localities to "seek to ensure" emergency services are available.[64] While there are no cases deciding whether sovereign immunity is still available for a city's failure to provide emergency services now that localities shall "seek to ensure" emergency services are available, cases still cite *Edwards* approvingly.[65] Thus, Poquoson can claim sovereign immunity for the failure to provide emergency services because Poquoson is exercising police powers to provide emergency services.

Poquoson Cannot Use the Public Duty Defense to Avoid Tort Liability for Injuries Resulting from Sea Level Rise

Poquoson cannot use the public duty defense to bar claims arising from injuries caused by roads, drainage, erosion, or flood control works, water services, sewer services, and emergency medical services. The public duty defense bars claims against the government where the government only has a duty to the general public and not to a specific individual.[66] Virginia's Supreme Court in *Commonwealth v. Burns* recently limited the public duty defense to cases where public officials have the duty to control the acts of a third party and the third party commits a criminal act.[67] The court limited the public duty defense because sovereign immunity already provides "sufficient protection" for public officials.[68] A prior case analyzed the public duty doctrine in the context of

emergency medical services.[69] However, *Commonwealth v. Burns* likely bars application of the public duty defense in cases involving injuries caused by roads, drainage, erosion, or flood control works, water and sewer systems, and emergency medical services.

Acknowledgement

Funding for this project came from the Virginia Environmental Endowment

Conclusion

Sea level rise could damage Poquoson's local government services. Poquoson's tort liability for injuries caused by local government services depends on the service involved. Poquoson may be liable for negligence claims alleging the failure to maintain roads and sewer services. Poquoson can avoid liability for the failure to maintain roads by discontinuing roads. Poquoson may not be liable for negligence claims alleging failure to maintain drainage, erosion, and flood control works, water services operated by Newport News Waterworks, or emergency services. Poquoson also may not be liable for discretionary decisions about roads, sewer services, and emergency services.

Notes

1 City of Poquoson, Multi-Hazard Mitigation Plan 40 (2009).
2 *Coastal County Snapshots*, NOAA Coastal Services Center, http://www.csc.noaa.gov/snapshots/ (last visited May 7, 2013).
3 City of Poquoson, *supra* note 1, at 82.
4 *See* Virginia Institute of Marine Science, Recurrent Flooding Study for Tidewater Virginia, S.J.R. 76, at 92 (2013).
5 *See, e.g.*, Atrium Unit Owners Ass□n v. King, 266 Va. 288, 293, 585 S.E.2d 545, 548 (2003) ("To establish actionable negligence, King had the burden to show the existence of a legal duty, a breach of the duty, and proximate causation resulting in damage."); Virginia Transportation Research Council, VTRC 04-R30, Tort Liability: A Handbook for Employees of the Virginia Department of Transportation and Virginia Municipal Corporations 5 (2004).
6 *See* Votsis v. Ward□s Coffee Shop, Inc., 217 Va. 652, 654, 231 S.E.2d 236, 237 (1977) ("[A] city has the positive and non-delegable duty to keep and maintain its streets and sidewalks in repair and in safe condition for public travel. The city is not an insurer against injuries, but it is liable for a negligent failure to discharge the duty."); City of Richmond v. Branch, 205 Va. 424, 428, 137 S.E.2d 882, 885 (1964) (holding Richmond liable when the city failed to repair a hole in a street); Burson v. City of Bristol, 176 Va. 53, 64, 10 S.E.2d 541, 544 (1940) (holding that a duty to keep streets safe extends to conditions adjacent to street); City of Norfolk v. Hall, 175 Va. 545, 553-54, 9 S.E.2d 356, 360 (1940) (upholding a jury verdict finding Norfolk liable for failing to maintain a street).
7 Va. Code Ann. § 15.2-2006 (West, Westlaw through 2012 Regular Sess.).
8 *See Votsis*, 217 Va. at 654, 231 S.E.2d at 237; *Branch*, 205 Va. at 428, 137 S.E.2d at 885, *Burson*, 176 Va. at 64, 10 S.E.2d at 544, *Hall*, 175 Va. at 553-54, 9 S.E.2d at 360.
9 *Burson*, 176 Va. at 64, 10 S.E.2d at 544.
10 Bloetscher et al., *Identification of Physical Transportation Infrastructure Vulnerable to Sea Level Rise*, 5 J. of Sustainable Dev. 40, 41 (2012).
11 Gambrell v. City of Norfolk, 267 Va. 353, 359, 593 S.E.2d 246, 250 (2004) ("The City□s decision to restrict its snow removal operations to its public streets, and its failure to place emergency warning signs in the parking lot, involved the City□s exercise of a governmental, rather than a proprietary, function. We reach this conclusion because these actions and omissions occurred in the context of an extended period of snow emergency and dealt with the determination of priorities directly related to the general health, safety, and welfare of the citizens."); Bialk v. City of Hampton, 242 Va. 56, 59, 405 S.E.2d 619, 621 (1991) (granting the city immunity for injuries caused by snow removal on roads); Fenon v. City of Norfolk, 203 Va. 551, 556, 125 S.E.2d 808, 812 (1962) (granting the city immunity for injuries caused from tree falling on road during hurricane).
12 Ord v. Fugate, 207 Va. 752, 758, 152 S.E.2d 54, 59 (1967) ("The effect of discontinuance upon a road is not to eliminate it as a public road or to render it unavailable for public use.").
13 Va. Code Ann. § 15.2-2006 (West, Westlaw through 2012 Regular Sess.).
14 *Id.*

15 *Id.*
16 *Id.*
17 *Id.*
18 *See, e.g.*, City of Lynchburg, v. Peters, 145 Va. 1, 27, 133 S.E. 674, 683 (1926); Erichsen v. City of Norfolk, 54 Va. Cir. 392 (2001).
19 *Peters*, 145 Va. at 13, 133 S.E. at 678 ("When the power to vacate or close streets has been delegated to a municipality, in the absence of a showing that the closure was for solely private benefit, or that it was the result of collusion or fraud, it is the exercise of a political or legislative function which the courts will not review."); *Erichsen*, 54 Va. Cir. 392 (2001) ("The closure of streets by a municipality is a legislative function, and the courts are loath to interfere with the exercise of legislative prerogatives. . . . While courts have used various words to describe the standard of proof required to justify interfering with a legislative action, the standard is that of clear and convincing evidence.") (citing Martin v. City of Danville, 148 Va. 247, 248-49, 138 S.E. 629 (1927)).
20 54 Va. Cir. 392 ("Although some property owners whose lots adjoin this street use it at times for ingress and egress, there is another means of access to those lots. The Plaintiffs have pedestrian access to their property from 8th Bay Street across Pretty Lake Avenue, although a more facile pedestrian access and limited vehicular access is available from 9th Bay Street over that portion of Pretty Lake Avenue which has been closed by City Council.").
21 145 Va. at 13, 133 S.E. at 678.
22 *Erichsen*, 54 Va. Cir. 392 (holding there was no takings claim for the loss of reasonable access where plaintiffs had pedestrian and limited vehicular access, but stating in dicta that if there was no access there could be takings liability).
23 *See* Va. Code Ann. § 15.2-970 (West, Westlaw through 2012 Regular Sess.).
24 *Id.* ("Any locality may construct a dam, levee, seawall or other structure or device . . .to prevent the tidal erosion, flooding or inundation . . . . No person, association or political subdivision shall bring any action at law or suit in equity against any locality because of, or arising out of, the design, maintenance, performance, operation or existence of such works but nothing herein shall prevent any such action or suit based upon a written contract.").
25 Cont□l Cas. Co. v. Town of Blacksburg, 846 F. Supp. 483, 485 (W.D. Va. 1993) ("[S]ince Blacksburg□s storm drainage system consists of structures, the purpose of which is to prevent flooding or inundation, it comes within the purview of Va. Code § 15.1-31."); Peerless Ins. Co. v. County of Fairfax,274 Va. 236, 244645 S.E.2d 478, 482 (granting sovereign immunity to locality for storm water works); Carter v. City of Norfolk, 54 Va. Cir. 195 (2000) (holding that city□s storm drainage pipe causing hole in street was immune under Va. Code § 15.1-31); Brizendine v. City of Roanoke, 43 Va. Cir. 353 (1997).
26 *See* Smith v. City of Bristol, 14 Va. Cir. 8 (1987) ("[T]he law of Virginia treats the maintenance of streets and storm sewers as proprietary functions."); City of Norfolk v. Hall, 175 Va. 545, 548, 9S.E. 2d 356, 358 (1940); City of Richmond v. Cheatwood, 130 Va. 76, 107 S.E. 830, 836 (1921) (holding Richmond liable for failing to maintain adequate drainage); Smith v. City Council of Alexandria, 74 Va. 208, 212 (1880) (extending a duty of reasonable care to construction of street drainage projects).
27 *See § 15.2-970*.
28 284 Va. 140, 726 S.E.2d 264 (2012).
29 Woods v. Town of Marion, 245 Va. 44, 45 425 S.E.2d 487, 488 (1993) ("On the other hand, a municipal corporation may be held liable, as a private person might be, for negligence in the exercise of its proprietary functions of operating its waterworks and performing routine maintenance of its streets."); City of Richmond v. Virginia Bonded Warehouse Corp., 148 Va. 60, 70-71, 138 S.E. 503, 506 (1927) ("But the operation of a water department for the purpose of supplying water for domestic and commercial purposes is a private or proprietary right, and for negligence in such operation a municipality is liable in like manner as a private individual."); Stansbury v. City of Richmond, 116 Va. 205, 81 S.E. 26, 28 (1914) (stating that cities have a duty to maintain water services once they are established).
30 Newport News Waterworks, www.nngov.com/waterworks (last visited May 7, 2013).
31 18 McQuillin Mun. Corp. § 53:77.46 (3d ed.) ("The general rule that an owner or employer is not answerable for the acts of an independent contractor is applicable to municipal corporations.The contractor is liable if negligence on his or her part is proved, but not the municipality.").
32 City of Richmond v. Gallego Mills Co., 102 Va. 165, 45 S.E. 877, 881 (1903) ("It is the duty of a city, from the time it acquires a sewer, to maintain it in a reasonably proper condition, without regard to what may have been the attitude of a former owner of the land through which it passes with respect to it."); Chalkley v. City of Richmond, 88 Va. 402, 14 S.E. 339, 341 (1891); Sullivan v. City of Hopewell, 70 Va. Cir. 134 (2006) ("[T]he law as set forth in *Chalkley* and *Cunningham*, that sovereign immunity protects municipalities from liability for the design and planning of sewer systems, but it does not shield them from liability due to the maintenance or operation of these systems, accurately states the law in Virginia at the present time.").
33 Poquoson, Va., Code of Ordinances § 82-32 (2008).
34 Cape Cod Commission, Regional Wastewater Management Plan: Sea-level Rise and Its Implications, 5 (2012), *available at* www.capecodcommission.org/resources/RWMP/RWMP_slr.pdf.
35 Va. Code Ann. § 15.2-2122 (West, Westlaw through 2012 Regular Sess.).
36 *Id.*
37 The final version of the statue requiring that localities "shall seek to ensure" the provision of emergency

medical services is a weaker requirement than originally proposed.A prior version of the legislation stated, "[e]ach locality shall be responsible for ensuring that emergency medical services are maintained on a 24-hour continuous basis throughout the entire locality." 2004 Virginia House Bill No. 2521, Virginia 2005 Regular Session, *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?051+ful+HB2521. Before this legislation in 2005, there was no duty requiring Virginia localities to provide emergency medical services. *See* Joint Legislative Audit and Review Commission of the VA. General Assembly, Review of Emergency Medical Services in Virginia, House Document No. 37 (2004), at 38-39.

38 Va. Code Ann. § 32.1-111.14 (West, Westlaw through 2012 Regular Sess.).

39 *Id.* § 27-14 ("Such governing body may make such ordinances in relation to the powers and duties of fire/EMS departments, companies, chiefs or directors and other officers as it may deem proper."); *id.* § 32.1-111.14 (stating that localities can "[e]stablish other necessary regulations consistent with statutes or regulations of the Board relating to operation of emergency medical services vehicles.").

40 *See id.* § 44-146.19 (West, Westlaw through 2012 Regular Sess.).

41 City of Poquoson, 2010 Emergency Operations Plan for the City of Poquoson 6.

42 *Id.* at 10.

43 *See, e.g.*, Atrium Unit Owners Ass□n v. King, 266 Va. 288, 293, 585 S.E.2d 545, 548 (2003) ("To establish actionable negligence, King had the burden to show the existence of a legal duty, a breach of the duty, and proximate causation resulting in damage.").

44 *See, e.g.*, Moore v. Virginia Transit Co., 188 Va. 493, 498, 50 S.E.2d 268, 271 (1948) ("The standard of conduct to which a party 'must conform to avoid being negligent is that of a reasonable man under like circumstances.□").

45 *Atrium*, 266 Va. at 293-94, 585 S.E.2d at 548 ("The proximate cause of an event is that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred.").

46 City of Chesapeake v. Cunningham, 268 Va. 624, 633, 604 S.E.2d 420, 426 (2004) ("A special plea of sovereign immunity, if proven, creates a bar to a plaintiff□s claim of recovery.").

47 *See, e.g.*, *id.* at 633-34, 604 S.E.2d at 426.

48 *See, e.g.*, *id.* at 633, 604 S.E.2d at 426.

49 *See, e.g.*, *id.*

50 Bialk v. City of Hampton, 242 Va. 56, 58, 405 S.E.2d 619, 620-21 (1991) ("[W]e have said that when governmental and proprietary functions coincide, 'the governmental function is the overriding factor.□) (citing Taylor v. Newport News, 214 Va. 9, 10, 197 S.E.2d 209, 210 (1973)).

51 *See* City of Richmond v. Branch, 205 Va. 424, 425, 137 S.E.2d 882, 883 (1964); Burson v. City of Bristol, 176 Va. 53, 64, 10 S.E.2d 541, 544 (1940); City of Norfolk v. Hall, 175 Va. 545, 549, 9 S.E.2d 356, 358 (1940).

52 240 Va. 367, 371, 397 S.E.2d 832, 835 (1990).

53 Gambrell v. City of Norfolk, 267 Va. 353, 359, 593 S.E.2d 246, 250 (2004) (granting sovereign immunity for injuries sustained when city decided to prioritize snow removal from streets and not to warn of snow and ice in a parking lot); Bialk v. City of Hampton, 242 Va. 56, 59, 405 S.E.2d 619, 621 (1991); Fenon v. City of Norfolk, 203 Va. 551, 556, 125 S.E.2d 808, 812 (1962).

54 267 Va. 353, 359, 593 S.E.2d 246, 250 (2004).

55 Va. Code Ann. § 15.2-970 (West, Westlaw through 2012 Regular Sess.).

56 *See* McQuillin Mun. Corp., *supra* note 31.

57 *See, e.g.*, Woods v. Town of Marion, 245 Va. 44, 44, 425 S.E.2d 487, 488 (1993); Hoggard v. City of Richmond, 172 Va. 145, 150, 200 S.E. 610, 612 (1939) (stating that municipalities are liable for ministerial actions involving the repair or maintenance of municipal water systems); City of Richmond v. Virginia Bonded Warehouse Corp., 148 Va. 60, 70-71, 138 S.E. 503, 506 (1927).

58 City of Chesapeake v. Cunningham, 268 Va. 624, 638, 604 S.E.2d 420, 429 (2004) (granting sovereign immunity for a decision to change water treatment methods); Stansbury v. City of Richmond, 116 Va. 205, 81 S.E. 26, 27 (1914) ("The adoption of a plan for supplying a city, or a given section of it, with water, involves the exercise of a delegated governmental power; and an error of judgment with respect to the efficiency and adequacy of such system is not in the first instance reviewable by the courts.").

59 See, Sullivan v. City of Hopewell, 70 Va. Cir. 134 (2006).

60 Chalkley v. City of Richmond, 88 Va. 402, 14 S.E. 339, 341 (1891); Sullivan v. City of Hopewell, 70 Va. Cir. 134 (2006).

61 Sullivan, 70 Va. Cir. 134.

62 237 Va. 167, 171 375 S.E.2d 747, 749 (1989).

63 *Id.*

64 Va. Code Ann. § 15.2-955 (West, Westlaw through 2012 Regular Sess.).

65 See Lee v. City of Norfolk, 281 Va. 423, 439, 706 S.E.2d 330, 338 (2011); Cunningham v. Rossman, 80 Va. Cir. 543 (2010); Andrews v. LogistiCare Solutions, LLC, 78 Va. Cir. 45 (2008).

66 Commonwealth v. Burns, 273 Va. 14, 17, 639 S.E.2d 276, 278 (2007).

67 *Id.* ("This Court has only applied the public duty doctrine in cases when a public official owed a duty to control the behavior of a third party, and the third party committed acts of assaultive criminal behavior upon another.").

68 *Id.* at 19, 639 S.E.2d at 279.

69 Meeks v. Broschinski, 63 Va. Cir. 150 (2003) (refusing to grant the public duty defense when a plaintiff relied on Staunton□s emergency medical services).

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